United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

74-1261

(41520)

To be argued by
BERNARD BURSTEIN

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

SAMUEL TITO WILLIAMS,

Plaintiff-Appellee,

—against—

THE CITY OF NEW YORK,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT AND AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

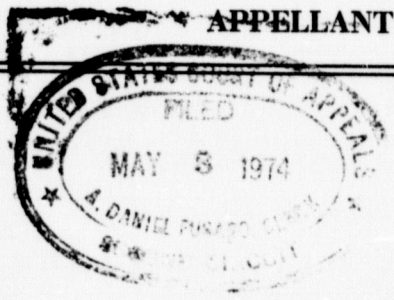

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

PAGE

PAGE

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APPELLANT'S BRIEF

The City of New York appeals from a judgment of the United States District Court for the Southern District of New York (CARTER, J.), entered on or about January 30, 1973, in favor of plaintiff on a claim for malicious prosecution, awarding $40,000 compensatory damages and $80,000 in punitive damages, and from an order entered November 14, 1973, denying defendant's post-trial motion for judgment n.o.v. (3-7).* The jurisdiction of the court is based on diversity of citizenship.

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* Numbers in parentheses, unless otherwise indicated, refer to pages in the Appendix.

Issues Presented

1. May a jury in a malicious prosecution action be permitted to find the requisite absence of probable cause for the prosecution where plaintiff's conviction, upon a jury verdict, based on his confessions, was unanimously affirmed despite an argument that his confessions were coerced as a matter of law; where the United States Supreme Court denied certiorari on that issue; where 15 years later his conviction was set aside in a habeas corpus proceeding and the confession held inadmissible upon the *undisputed* fact of 17 hours of continuous interrogation; and where the only evidence in this malicious prosecution action was plaintiff's testimony that his confessions were obtained by physical brutality and threats, which is the *same* testimony that he had previously presented, and which was rejected, in the criminal proceeding?

2. If the plaintiff is entitled to prevail, is he entitled also to punitive damages from a municipality?

Facts

The prior criminal proceedings.*

(1)

On April 20, 1947, some time after 1:00 A.M., a burglar, using an iron bar, forced open a window and entered the ground floor apartment of the Graff family. Fifteen-year old Selma Graff awoke and grappled with the burglar until he beat her into unconsciousness with the bar. Also in

* The facts with respect to these prior proceedings are taken in part from the transcript of the testimony at the instant trial, but in most part from the transcript of the criminal trial (Defendant's Exhibit "A") and, in part, from judicial opinions and records of which this court may take judicial notice. Numbers in parentheses refer to pages in the Appendix on Appeal.

the darkened bedroom was Selma's ten-year old brother, Donald, who was himself hit over the head and severely injured. Donald survived, but Selma died without ever regaining consciousness (323 F.2d at pp. 70-71).

Over a period of many months, the police continued an investigation, questioning many suspects in connection with this crime and as to many other burglaries in this area (73-74). About four months after the Graff murder, a police patrol observed a person, in that area, alone, at 2:30 A.M. It was plaintiff, then 18 years old (30). He was unemployed, and had been for several months (30). These circumstances aroused the suspicions of the police, and plaintiff was taken, first to his residence, where police found some suspicious articles, and then to the police station. He was not advised of his right to remain silent or his right to counsel (it was 1947), and he was questioned extensively, first about various other crimes and then about the Graff murder. After a period of 17 hours during which he was not permitted to see his mother or a lawyer, he confessed to the murder of Selma Graff. Admittedly he wrote a confession in his own hand. Moments later, he confessed again to an Assistant District Attorney, in question-and-answer form, and this was taken down by a stenographer, transcribed, and signed. He was then taken to the Graff apartment where he reenacted the crime before witnesses. At the Graff home, he was asked by the dead girl's mother "why did you kill my Selma?," and, according to Asst. D.A. Perlman and Mrs. Graff, plaintiff answered, "I didn't mean it. I didn't mean to do it" (81, 84).

The accused was brought before a Magistrate, some 34 hours after first taken into custody, and charged with murder in the first degree. When asked to plead, he remained silent, and a plea of "not guilty" was entered on his behalf

by the Court (39, 49). Three lawyers were appointed to represent him (50). Anticipating that the defense might challenge the voluntariness of the confession, the Judge, at arraignment, ordered that photographs be taken of the defendant for use in his defense (51).

(2)

The accused was tried in January of 1948, over a period of 2½ weeks. The confessions were the only evidence of guilt, and the jury was so charged. Ten-year old Donald Graff—the only eye witness—was produced at trial, by the prosecuting attorney, and there maintained, as he had before, that the murderer was a "white man" with "reddish skin" (The defendant was a negro). The defendant, who testified at the trial, maintained that the confessions were untrue and had been extracted from him only after, and because of, vicious beatings and threats against his life by police officers.* The Trial Court charged the jury that if

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* District Judge Dawson read the record of the criminal trial (Def. Exh. "A" in this case), when passing on a habeas corpus application in *United States ex rel. Williams* v. *Fay*, 211 F. Supp. 359 (S.D.N.Y., 1962), and described the trial (at p. 362):

> "At the trial, petitioner took the witness stand and testified at great length concerning the alleged police brutality. Petitioner exhibited to the jury the bruises and scars which he stated remained as a result of the alleged beatings. In rebuttal to his contention the police and the assistant district attorney testified as to the lack of coercion. Further there was testimony of the admittance clerk of the Raymond Street jail to which petitioner was committed following his arraignment in Felony Court. According to that testimony, petitioner complained only of swollen legs caused by rheumatic fever. There was also testimony by the jail physician who examined the petitioner and while he did find some injuries, these were inconsequential compared to the torture described by petitioner. Defense counsel introduced a series of photographs taken of petitioner on September 20, 1947. This was a result of an order of Judge Leibowitz of the County Court when petitioner was arraigned in that court on September 12th.

they found the confession involuntary, they were required to acquit (See 211 F.2d at p. 362). The jury, applying the "beyond a reasonable doubt" standard, returned a verdict of "Guilty" of murder in the first degree.

The jury made a recommendation of life imprisonment to the Trial Court, but the Court, on March 22, 1948, with further information of the defendant's "criminal record," imposed a death sentence.*

An appeal was taken to the New York Court of Appeals, which unanimously affirmed both the conviction and the sentence. *People* v. *Williams,* 298 N.Y. 803 (1949). The Court wrote no opinion, but the briefs on appeal indicate what arguments were made and rejected. In Point I, Defendant-Appellant argued: "The confessions were obtained by unlawful means and were inadmissible as a matter of law." In support of the argument, the brief referred to the sharp conflict in the evidence, but stressed the undisputed evidence that the 18-year old defendant had been questioned for about 17 hours, held incommunicado, without sleep, and not fed for about 12 hours after taken into custody. It referred also to testimony by the Assistant District Attorney and a jail physician of signs of physical injury to defendant, and to the photographic evidence. It referred also to "reasonable doubt" arising from the identification of the murderer as a white man, by 10-year old Donald Graff (App. Br., in *People* v. *Williams,* 298 N.Y. 803, pp. 10-25). The District Attorney's brief, in response, maintained that a "sharp question of fact was presented which was properly submitted for the jury's determination"

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* In affirming the sentence, the United States Supreme Court, in *Williams* v. *New York,* 337 U.S. 241, 243 (1948), observed that the record showed confessions, and in some cases identifications, with respect to thirty burglaries. Psychological tests showed a "morbid sexuality" and a dangerous personality (at p. 243).

(Resp. Br., in *People* v. *Williams,* 298 N.Y. 803, pp. 21 *et seq.*)*

The American Civil Liberties Union, as *amicus curiae,* argued that the Trial Court's failure to follow the jury's recommendation *on sentence,* and its consideration of *ex parte* information, without permitting the defendant to confront and cross-examine witnesses on those subjects, violated defendant's constitutional (14th amendment) rights, and that New York Criminal Code §482, insofar as it permitted such procedure, was unconstitutional. By amending the remittur, the Court of Appeals indicated that all the constitutional arguments in this case had been considered, and rejected (298 N.Y. 863).

The case was appealed to the U.S. Supreme Court, pursuant to 28 U.S.C. §1257(2), but solely on the sentencing issue. The Court, on June 6, 1949, affirmed. *Williams* v. *New York,* 337 U.S. 241 (1949). The Supreme Court did observe therein, as *dictum,* that the evidence at trial had "proved" the crime (337 U.S. at p. 243). (See, also, *U.S. ex rel. Williams* v. *LaValle,* 170 F. Supp. 581 [N.D.N.Y.] at p. 584, and at 276 F. 2d 645 [2d Cir., 1960] at p. 647.)

A subsequent motion for reargument in the New York Court of Appeals was denied on October 11, 1949 (300 N.Y. 460).

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* In a later *habeas corpus* proceeding in *United States ex rel. Williams* v. *LaValle,* 170 F. Supp. 582 (N.D.N.Y., 1959)—District Judge Foley, after stating that he had read the entire record in the criminal case, observed (on p. 584): "The issue of coerced and involuntary confession was strongly pressed in detail in the briefing to the Court of Appeals by the attorneys for petitioner Williams, and the Court of Appeals by its affirmance passed upon such point." The Court also commented that in the briefs presented to the New York Court of Appeals the facts and circumstances accompanying the obtaining of these confessions with references to the record were "ably and masterfully set forth" (at p. 585).

On November 16, 1949, Governor Thomas E. Dewey commuted the sentence to life imprisonment, although he did write that "defendant's guilt has been established" (See, *United States ex rel. Williams* v. *LaValle,* 170 F. Supp. 581 at p. 586).

(3)

Ten years later, a new proceeding was commenced by the filing of *pro se* petition for a writ of habeas corpus —*United States ex rel. Williams* v. *LaValle,* 170 F. Supp. 582 (N.D.N.Y., 1959 FOLEY, J.).* The Court, after reviewing the record, found "adequate support in [that] record for the State to prevail in its position that the confessions were freely and voluntarily obtained." (170 F. Supp. at pp. 585-586).

That determination was appealed, with assigned counsel, to this court—*United States ex rel. Williams* v. *LaValle,* 276 F. 2d 645 (2d Cir., 1960). This Court held that since petitioner had limited his appeal to the United States Supreme Court to the sentencing issue, and since certiorari was an incident to the state remedy, he had therefore failed to exhaust his state remedies on the confession issue. It expressly indicated no opinion on the merits.

The United States Supreme Court dismissed relator's appeal from that decision (*Williams* v. *LaValle,* 362 U.S. 637 [1960] and also denied certiorari (364 U.S. 922 [1960]).

Plaintiff, for a second time, moved for reargument in the New York Court of Appeals. That motion was denied. *People* v. *Williams,* 11 NY 2d 888 (1962).

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* A *habeas corpus* proceeding is a civil proceeding separate and apart from the criminal case. *Heflin* v. *United States,* 358 U.S. 415, 418 n. 7 (1959); *Flint* v. *Howard,* 464 F.2d 1084, 1085 (1st Cir., 1972).

An application for certiorari (now raising the confession issue) was denied. *Williams* v. *New York,* 370 U.S. 960 (1962).

The plaintiff then sought relief by way of a collateral application—*coram nobis* in the County Court, Kings County—and the writ was denied (See 323 F. 2d at p. 66).

(4)

Now with his State remedies fully exhausted, plaintiff commenced another *habeas corpus* proceeding—*United States ex rel. Williams* v. *Fay,* 211 F. Supp. 359 (S.D.N.Y., 1962—DAWSON, J.). The Court, after reading the transcript of the state proceedings, held that the record "in this instance affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, without necessity of a new hearing." The Court reviewed and referred to the evidence, and noted the jury had been charged, in detail, and correctly, on the confessions, and charged also that if they found "that the confessions were not voluntary or not true, they were bound to acquit the defendant" (at p. 362). "The issue of coercion", said the Court, was "fairly presented to the jury under proper instructions. The function of a federal court is not to sit as a super-jury and as such to conclude that the confession was coerced" (at p. 363). It referred to the comments in *Williams* v. *New York,* 337 U.S. 241, 243, 252 (1949), as to the fairness of the trial and the sufficiency of the evidence of guilt.

This Court, in *United States ex rel. Williams* v. *Fay,* 323 F. 2d 65 (2d Cir., 1963), unanimously reversed (Chief Judge Lumbard concurring separately), and directed that the writ be issued requiring release of relator unless promptly retried on the indictment, holding that "the un-

disputed facts show coercion under present standards of due process (at p. 67.)

The majority opinion, by Circuit Judge Smith, held that while the jury verdict in the criminal trial was "necessarily a finding that the confessions had not been coerced", it did not foreclose a writ of habeas corpus, and, upon such an application, a determination of the issue "anew." The Court did not adopt petitioner's claims of brutality but relied solely upon "the undisputed historical facts" relating to the duration of questioning.

Chief Judge Lumbard likewise indicated the basis of the decision was that 18 or 19 hours of continuous questioning by police, under the undisputed circumstances, "are *now* considered to be so inherently coercive as to support *by themselves* that claim that Williams' confession was not voluntary (at p. 70—emphasis added). He observed that police should have the right to question, confront or test witnesses or suspects for "some reasonable time" (at p. 72), but "now have little or no guide under New York law or federal court decisions from which they can determine with any safety how long they may detain and question a suspect in such circumstances as we find here" (at p. 71).

The United States Supreme Court denied certiorari on February 17, 1964, *sub nom. Fay* v. *Williams*, 376 U.S. 915 (1964).

The indictment was dismissed on July 2, 1965 (28, 46), although the defendant had actually been at liberty since November 26, 1963 (46, 47).

The instant civil action—the nature of the claim.

(1)

Plaintiff commenced an action for false arrest and malicious prosecution in 1964 and a second one, for the same causes, in 1966, both solely against the City of New York, and the two actions were consolidated (25-29).

The false arrest claims in *both* actions were dismissed as time-barred (24-25). The claim for false arrest (as distinguished from malicious prosecution) arose at the time of the arrest and the time to serve a notice of claim runs from claimant's *release* from prison, in this case November 26, 1963 (26). Plaintiff did not serve his earliest notice of claim (pursuant to General Municipal Law §50-e) until May 16, 1964—more than 90 days after his release (26).*

The cause of action for malicious prosecution arose when the indictment was dismissed on July 2, 1965, (when there was the necessary favorable termination of the prosecution), and the action for malicious prosecution commenced in 1964, which *predated* the favorable termination (in July of 1965), was properly held to be premature (26-29). The only claim that was considered at this trial was the concededly timely 1966 claim for malicious prosecution (27-29).

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* General Municipal Law §50-e(1): "In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action against a police corporation . . . the notice shall . . . be given which 90 days after the claim arises." See, *Dorak* v. *County of Nass. of St. of N.Y.*, 329 F.Supp. 497, 503 (E.D.N.Y., 1970) affd. 445 F.2d 1023 (2d Cir. 1971); *Caminito* v. *City of New York*, 25 AD 2d 848, 849 (2d Dept., 1966) affd. 19 NY 2d 931 (1967), *Molyneaux* v. *County of Nassau*, 22 AD 2d 954 (2d Dept., 1964) affd. 16 NY 2d 663 (1965); *Schildhaus* v. *City of New York*, 23 AD 2d 409, 411 (1st Dept., 1965) affd. 17 NY 2d 853 (1965); *Allee* v. *City of New York*, 42 AD 2d 899 (1st Dept., 1973).

(2)

With respect to the claim of malicious prosecution, the complaint alleges that on September 8, 1947, at about 2:30 a.m., defendant's "agents, servants and/or employees" (the complaint never refers to specifically to police) "maliciously, wrongfully and unlawfully" arrested, searched, and detained plaintiff, and subjected him to cruel and inhuman treatment, continuous interrogation, held him incommunicado, failed to advise him of his rights and "through such means induced him to falsely confess to a crime that he did not commit" (10); that they "wrongfully coerced and extracted" from him an "illegal, unlawful and baseless confession in order to procure his conviction . . . despite his actual innocence" (10-11) so that he was "falsely and tried and convicted and incarcerated in prison for many years" (11); that they intentionally and maliciously assembled and presented evidence at his trial which was known to be false and misleading, and suppressed evidence in his favor in order to secure his conviction (11). By reason of this confinement, plaintiff claims damages for $2,000,000 (13). There was no specific claim for punitive damages (13, 16).

The City's answer denies these allegations, enumerates the prior criminal proceedings, and affirmatively alleges that its employees acted "in good faith and with reasonable and probable cause" (17-23).

The Trial.

(1)

Plaintiff, the only witness on his case, gave essentially the same testimony that he had given, as defendant, 25 years before in *People* v. *Williams*, and "in as much detail" (52-55).

He had worked as a stock clerk until July of 1947 but had stopped working on the advice of a doctor because of rheumatic heart disease (39, 43). When arrested on September 9, 1947, he had been unemployed for about 3 months (30).

At 2:00 a.m. when taken into custody he was alone, and according to his testimony, he had just come "out of the park" (30). He testified that "someone called out and ran up behind me and they grabbed me and . . . started searching me under my arms and my legs" (31). (Although he did not specifically identify the persons as police, it was obvious he was referring to police.) The police took him to his home, where they conducted a search, took some of his clothes and "stuff," and then took him to a police station, where they handcuffed him to a radiator by the window (31). They asked all sorts of questions about various burglaries, which he denied, and then, according to plaintiff, they "started knocking me in the head and beat me" (31). Over a period of 38 hours, "many, many people" were brought down to look at him, but none identified him as a criminal (32), which, plaintiff said, made the police "all the madder and they just beat me more" (31-32), on the legs, arms, head, the back of the head, all over the body, with rubber hosing, causing his legs to swell (32). They took him to various places for people to look at him, yet no one identified him as a criminal (32). Plaintiff testified that they "burned" him with cigarettes, on his arm and on his penis (32, 34); that they would not let him sleep (34), and that, except for one bite of a sandwich, they gave him nothing to eat (35). Throughout this time he was not permitted to see his mother or a lawyer.

After many hours of questioning, they started to ask about the Selma Graff murder of which he denied knowledge (35-36). Plaintiff testified to having his pants "ripped"

at the "fly" by a big police officer and having his testicles squeezed so hard that he fell unconscious (32); and afterwards being revived with water (32), and told by police in detail just how Selma Graff was killed (50, 51). Then he was allegedly threatened by a police officer, as follows: "You see that window . . . I'm going to throw you out of it . . . who cares about whether you die or not, you're just another black bastard goon. All I got to say is you tried to escape" (36). Then he was handed a paper, told what to write, and did write out a confession to the murder of Selma Graff (36).

Then an Assistant District Attorney came in and, in the presence of a stenographer, asked him many questions about the murder (37, 75-76), to which he answered "yes" or indicated other forms of agreement (37).

Later, in the company of the Assistant District Attorney and police, he was taken to the Graff house (37). There was an angry crowd outside, and he was struck by one of the crowd (not a policeman). He testified to a blow to the left shoulder with a rake (37, 38). Later, they (presumably the Assistant District Attorney and police) took him to a school and showed him to 10-year old Donald Graff, the brother of the slain girl who had witnessed the murder, and the boy said that plaintiff was not the murderer, that the murderer was "a white man" (38) (Plaintiff is a negro.) The police took the boy aside and spoke to him for about five minutes, but he continued to maintain, as before, that plaintiff was not the murderer, and that the murderer was a white man (38).

Three attorneys represented plaintiff at the criminal trial (76) but he spoke to only one of them—Mr. Jesse Griggs from the N.A.A.C.P., who was black; he was "afraid of the white lawyers" (50). He did speak to Mr.

Griggs, before trial, in the prison visiting-room and then every day during the trial (51). The criminal trial lasted 2½ weeks. The plaintiff derogated it—"They called it a trial" (41), but he did not amplify.*

On cross-examination, plaintiff testified that the photographs of him, as ordered by Judge Leibowitz, were provided to his attorneys and were in evidence at the criminal trial (52, 55). Plaintiff testified that at the time of his criminal trial, he was no longer afraid of police (55), and that he testified there of his "treatment at the hands of the police officers" and of his injuries, just as he did here and "in as much detail" (52-55).

At the close of plaintiff's case defendant moved to dismiss for failure to prove a prima facie case of malicious prosecution (63-64), and the Court reserved decision (64-67).

(2)

On defendant's case, counsel read to the jury from Defendant's Exhibit A (the transcript of *People* v. *Williams*) from the testimony of Assistant District Attorney William S. Perlman, a member of the bar since 1925, an Assistant District Attorney for 7 years prior to plaintiff's arrest, and before that an Assistant U.S. Attorney for 5 years (74-75). Perlman had testified that he took a statement from plaintiff, in question and answer form, confessing to the murder.

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* Mr. Justice Black, writing for seven members of the United States Supreme Court, in *Williams* v. *New York*, 337 U.S. 241 (1948), wrote (at p. 243): "The record [which is Def. Exh. A in this case] shows a carefully conducted trial lasting more than two weeks in which appellant was represented by three appointed lawyers who conducted his defense with fidelity and zeal". District Judge Foley, in *U.S. ex rel. Williams* v. *LaValle*, 170 F. Supp. 582, 586 (N.D.N.Y. 59), described defendant's appointed counsel as "most eminent."

Then they went to the Graff house, where plaintiff re-enacted the crime (75-76). Back at the precinct, plaintiff was asked by him how he felt, and said, "Fine" (76).

Mr. Perlman, on direct examination in the criminal trial, testified that plaintiff, during the reenactment, did have a slight limp in left leg, and that he asked plaintiff about it. Plaintiff said it was "nothing," that it was result of rheumatic fever (76-77). Perlman testified also to a "slight discoloration" of the left eye, in a corner, and to a slight swelling on the cheek (77-78), and photographs were taken (77). Plaintiff appeared to Perlman at the time to be calm and cool (77), and answered questions "very freely," and was "friendly" (77).

When plaintiff asked for his mother, Perlman had her brought in (78), and gave them a room to be by themselves (79). After 10 to 15 minutes, Perlman entered, and asked plaintiff "Samuel, did you tell your mother that you hit the Graff girl?," Samuel answered: "I didn't mean it. It was intentional" (79). Assistant District Attorney Perlman remembered this distinctly because it was unusual that plaintiff used the word "intentional" (79). Perlman understood that it was a mistake for the word "unintentional" (80).

The dead girl's mother also testified at the criminal trial. She was present at the reenactment of the crime in her home, and shouted at plaintiff: "Why did you kill my Selma?" His response to her was "I didn't mean it" (84). Perlman also testified to this exchange that plaintiff said: "I didn't mean it. I didn't mean to do it." (81).

(3)

On "rebuttal," plaintiff's attorney read from the testimony of Donald Graff, the dead girl's 10-year old brother,

who saw the murder from his bed (87), and who was able, he said, by the light from the foyer, to see his sister scuffle with the intruder, and the intruder's head and clothes and identified the intruder as having "a red skin," and that he told police that the intruder was a "white man" (87-91).

The City, in response, read from the testimony of Donald Graff's doctor, Dr. Everett Corradini, who treated Donald on the night of the murder, and described the boy at the time as "almost unmanageable, highly active, occasionally unintelligible, and uncooperative, frequently crying, hysterical" (96). The boy had a 1½ inch cut in his scalp, almost to the bone, and was incoherent a good part of the time (96).

At the close of the evidence, the City renewed its motion to dismiss for failure to show lack of probable cause and malice (98-100). The Court indicated it would submit the case to the jury (100). It did not specifically rule on the motion at that time, saying: "I don't think it matters because I would be in a position to reconsider it after the verdict has come in" (100).

(4)

The jury returned a verdict in favor of plaintiff in the amount of $40,000 in compensatory damages and $80,000 in punitive damages (104).*

The City moved to set aside the verdict as contrary to law, both as to the liability verdict and, also, specifically, as to the punitive damages (104-105). The Court suggested that the motion for judgment notwithstanding the verdict be formalized on written papers (105), and this was promptly

* There were no exceptions to the charge, which included an instruction that jury could return an award for punitive damages (101).

done (106). The Court denied the motion with a written opinion (106-116).

In its opinion, the Trial Court acknowledged that New York substantive law applied; and it devoted a significant portion of its opinion to a discussion of *Caminito* v. *City of New York,* 25 AD 2d 848 (2d Dept., 1966) affd. 19 NY 2d 931 (1967), the case principally relied on by the City, which the Court concluded was distinguishable (115-116).

POINT I

The affirmed criminal conviction of plaintiff where the jury, on all the evidence, necessarily found plaintiff's confession to be voluntary and credible (*People* v. *Williams*, 298 N.Y. 803 cert. den. 370 U.S. 960), establishes probable cause for the prosecution as a matter of law. The fact that 15 years later the U.S. Court of Appeals, in a habeas corpus proceeding, applying the then current standard with respect to permissible duration of police questioning, set aside the judgment of conviction solely upon the undisputed duration of questioning does not now permit the person released to maintain an action for malicious prosecution based on the same evidence that was litigated and decided against him in the criminal proceedings and affirmed "under then-existing State law." *Caminito* v. *City of New York*, 25 A D 2d 848 (2d Dept., 1966) affd. 19 NY 2d 981 (1967).

(1)

"A malicious prosecution is one that is begun in malice, without probable cause to believe it can succeed, and which finally ends in failure." *Burt* v. *Smith*, 181 N.Y. 1, 5 (1905); *Heaney* v. *Purdy*, 29 NY 2d 157, 159 (1973). While a jury may infer malice from an absence of probable cause, the converse is not true—"If probable cause exists, it is an absolute protection against an action for malicious prosecution, even when express malice is proved." *Burt* v. *Smith*, 181 N.Y. 1, 6 (1905); *Schultz* v. *Greenwood Cemetery*, 190 N.Y. 276, 278 (1907). The most convincing proof of overt malice does not permit an inference of lack of probable cause. *Benson* v. *Southard*, 10 N.Y. 236, 238 (1851); *Rawson* v. *Leggett*, 184 N.Y. 504, 512 (1906). Furthermore, as

would be obvious, the existence of probable cause must be judged under the law *as it appeared* to be at the time the prosecution was commenced and not as it ultimately turned out. *Caminito* v. *City of New York,* 25 AD 2d 848 (1st Dept., 1965), affd. 19 NY 2d 913 (1966); Cf. *Pierson* v. *Ray,* 386 U.S. 547, 557 (1967). In a malicious prosecution action (unlike a false arrest action) the burden of proving the absence of probable cause is upon the plaintiff. *Burt* v. *Smith,* 181 N.Y. 1, 10 (1905). "Probable cause does not necessarily depend on the actual guilt of the person prosecuted, but may rest upon the prosecution's belief in his guilt when based on reasonable grounds". *Burt* v. *Smith,* 181 N.Y. 1, 6 (1905). Reasonable grounds, and therefore "probable cause to believe [the prosecution] can succeed," is demonstrated, we submit, when the prosecution is successful.

A distinction should be drawn for this purpose between an indictment and a judgment, and even more clearly between an indictment and the instant case—an *affirmed* judgment. The garden variety malicious prosecution involves an indictment followed by an acquittal after trial, and there the indictment establishes only *prima facie* probable cause. *Hopkinson* v. *Lehigh Valley R.R. Co.,* 249 N.Y. 296, 300 (1928). The same is true where the accused is held by a magistrate after an examination into the facts. *Hopkinson, supra; Graham* v. *Buffalo General Laundries,* 261 N.Y. 165, 167 (1933); *Schultz* v. *Greenwood Cemetery,* 190 N.Y. 276, 280 (1907); *Eberhardt* v. *Con. Edison Co.,* 1 AD 2d 1001 (1st Dept., 1956) affd. 3 NY 2d 968 (1957); *Ravenscroft* v. *Casey,* 139 F. 2d 776 (2d Cir., 1944) cert. den. 323 U.S. 745 (1944). In these situations the prosecution, up to that point of indictment, has been a one-sided presentation—thus it cannot be conclusive. The plaintiff may overcome this *prima facie* showing of probable cause

by proof "that the defendant did not make a full and complete statement of the facts either to the magistrate or to the District Attorney or has misrepresented or falsified the evidence or else has kept back information or fact which might have affect the result." *Hopkinson* v. *Lehigh Valley R.R. Co.*, 249 N.Y. 296, 300 (1928).

But a judgment, unlike an indictment, is based on a two-sided presentation. The distinction is brought out in the leading case of *Burt* v. *Smith*, 181 N.Y. 1 (1905). There defendants, on affidavits, had previously obtained an injunction *pendente lite*, which was reversed on appeal. In a subsequent malicious prosecution against them, the Trial Judge granted a nonsuit on the ground that the order granting the *preliminary* injunction was conclusive evidence of probable cause. This, said the Court of Appeals, was error because just "as an order for a temporary injunction requires but a *prima facie* case, we think it is only *prima facie* evidence of probable cause" (at p. 8). The distinction between a preliminary injunction, made on an *ex parte prima facie* showing, and a permanent injunction, made after a full trial, was drawn by this court in *Salvage Process Corp.* v. *Acme Tank Corp.*, 104 F. 2d 105, 107 (2d Cir., 1939) citing the *Burt* case, and holding that the "granting of a *final* injunction, despite reversal on appeal, is *conclusive* evidence of probable cause for the prosecution" (emphasis added).

More recently the same was held by this court in *Dacey* v. *N.Y. County Lawyers Ass'n*, 423 F. 2d 188, 195, (2d Cir., 1969), cert. den. 398 U.S. 929 (1970) which was a 42 U.S.C. §1983 action but was decided by "analogy to malicious prosecution," and there also this court drew the distinction between an *ex parte* determination and one after a full trial. See also, the District Court opinion in *Dacey* at 290 F. Supp. 834, 842 (S.D.N.Y., 1968—WYATT, J.).

Just the same rationale distinguishes a *criminal* indictment by a grand jury or an action of the magistrate (which is a one-sided *prima facie* showing) and a judgment after a full trial, especially since a criminal conviction requires more proof than an injunction, i.e., beyond a reasonable doubt. The rationale of *Burt* v. *Smith,* 181 N.Y. 1 (1905) was cited, and applied, in malicious prosecution case following a *criminal* conviction in a court of superior jurisdiction, in *Francisco* v. *Schmeelk,* 156 App. Div. 335, 338-339 (2d Dept., 1913): there the court held "that the judgment of a superior court against the defendant [in a criminal prosecution for larceny] is *conclusive* evidence of probable cause in an action to recover damages for malicious prosecution, notwithstanding the reversal of that judgment by an appellate court." (emphasis added)

In the instant case, not only was there a unanimous verdict by the jury, in a case of a capital crime, under the "beyond a reasonable doubt" standard, but there was *also* an unanimous affirmance by the State's highest court, (298 N.Y. 803, a unanimous denial of reargument on the basis of more recent authorities by that same court, now with 6 different judges (11 NY 2d 888), and afterwards the denial of habeas corpus by two federal judges (170 F. Supp. 581 and 211 F. Supp. 359). Not counting the discretionary denial of certiorari, and denial of *coram nobis,* and also not counting *dictum* the U.S. Supreme Court in *Williams* v. *New York,* 337 U.S. 241, 243 (1949) (that the trial was a fair one and the evidence "proved" the crime), there were here, in addition to the jury, no less than *sixteen* different judges who, by affirming or declining to set aside the judgment of conviction, found in effect that there was probable cause for the prosecution under the then "current" standard.

(2)

Alternatively we would argue that if this plaintiff be allowed to overcome the judgment to present a claim of lack of probable cause, then he should be required to present at least *some* evidence that was *not* part of the record of the trial that resulted in that judgment. The evidence here is insufficient for such purpose.

For example, to show lack of probable cause for the prosecution, plaintiff stressed that the only eye witness to the murder, 10-year old Donald Graff, did not identify him and that police officers attempted to influence Graff to change his identification. Yet Donald did not change his identification, and he did testify at the criminal trial. In fact, it was the prosecution that called him; and it was plaintiff here who, in "rebuttal," read from Donald's *trial* testimony (87-91), showing that Donald's identification and all of the circumstances relating to its reliability were placed before the jury in the criminal trial. The plaintiff's testimony here as to Donald Graff was irrelevant—and highly prejudicial. In no way does it show that the judgment of conviction was obtained by withholding evidence.

Similiarly plaintiff's testimony of physical injuries was explored, indeed much more fully explored, at the criminal trial, not only be the testimony of plaintiff, but also the candid testimony of the Assistant D.A., the jail physician, and by photographic evidence, and was in fact a major part of the trial as well as the appeals. The same is true as to the confessions. At the criminal trial, the plaintiff testified in at least as much detail as he did here—and no doubt his recollection was better—and all of this evidence was before a jury on an issue on which the prosecution had the very heavy burden of proof. See *United States ex rel. Williams* v. *Fay*, 211 F. Supp. 359, 362

(S.D.N.Y., 1962) and *United States ex rel. Williams* v. *Fay,* 170 F. Supp. 582, 584 (N.D.N.Y., 1959). Plaintiff now seeks to litigate anew, *on the very same evidence,* before another jury, a contention that was previously rejected. If the effect of that judgment is to be avoided, it must be upon at least some evidence that was withheld from the criminal proceedings. Otherwise it is only one jury second-guessing another. See also, *Lambert* v. *Cory,* 23 AD 2d 731 (1st Dept., 1965) lv. den. 16 NY 2d 484 (1965).*

Indeed, when habeas corpus was granted here, it was not upon facts withheld by police, or any claim of brutality, but solely upon the *undisputed* facts relating to the duration of questioning. (See 323 F. 2d 65, at p. 66).

(3)

Assuming *arguendo* that a plaintiff in a malicious prosecution action can litigate on precisely the same evidence that was before the jury in the criminal proceeding *where the judgment of conviction was reversed on appeal,* that should still not be the situation here where we have an *affirmed* judgment. That judgment, it is true, was set aside —but on a collateral attack in a separate proceeding.** It

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* Plaintiff's attorney of record perceptively wrote in an article, LIPSIG & SILVER, *Civil Remedies of Prisoners Released on Habeas Corpus; a Problem for the Bar,* N.Y. State Bar Journal, Dec. 1965, at p. 505: "Any attorney using this approach [that the conviction was obtained by fraud] should be cautioned that its validity depends on whether vital facts were withheld from the trial court. If the facts are part of the record they will be deemed to have been considered by the jury before rendering the judgment so that no fraud is present. . . . Needless to say, in most coerced confession cases, both sides will have had a chance to place their versions of the facts on the record, so that no withholding of facts generally occurs."

** That a *habeas corpus* is a separate proceeding and distinct from the criminal proceeding is established in, e.g., *Heflin* v. *United States,* 358 U.S. 415, 418 (1959); *Flint* v. *Howard,* 464 F. 2d 1084, 1085 (1st Cir., 1972).

was never reversed. What is the distinction? An affirmed judgment normally has *res judicata* effect. While it is true that this doctrine does not apply to the *habeas corpus* proceeding itself—here we are dealing with the "Great Writ" and a petitioner's liberty from custody. For that purpose, and that purpose only, the Court may, as it did here, determine the issue "anew." *United States ex rel. Williams* v. *Fay,* 323 F. 2d 65 (2d Cir., 1963). See also *United States ex rel. Smith* v. *Martin,* 242 F. 2d 701 (2d Cir., 1957). Furthermore, on habeas corpus, a Court may, as it did here, use "present standards" (323 F. 2d at p. 67). But because it may do this to secure a prisoner's liberty, or perhaps also to remove the disabilities of a criminal conviction, does not mean that it opens the gates to litigate, for any other purposes, issues previously and conclusively determined where the determination was *affirmed* under legal standards then approved.

This most significant factor—the affirmance of the judgment—is found in only one other malicious prosecution case we know of, a fairly recent decision, and also from New York, which we submit is dispositive in this case: *Caminito* v. *City of New York,* 25 A D 2d 848 (2d Dept., 1966 affd. 19 N Y 2d 931 (1967).

The facts in *Caminito's* case, as set forth in *United States ex rel. Caminito* v. *Murphy,* 222 F. 2d 698 (2d Cir. 1955) and also at 45 Misc 2d 241 (Sup. Ct., Kings Co., 1955), are briefly as follows: In May of 1941 the police took Santo Caminito into custody and began to question him in connection with a murder. He was questioned continuously without sleep, without a lawyer, with various people pretending to identify him, until, after 27 hours, he confessed to the murder. He was not arraigned until 40 hours after being taken into custody. At trial, where the only evidence was the confessions, Caminito was convicted of murder in

the first degree and sentenced to life imprisonment. The judgment of conviction was affirmed by the Appellate Division (265 App. Div. 960), and the New York Court of Appeals (291 N.Y. 541, rearg. den. 297 N.Y. 882, rearg. den. 307 N.Y. 689). Certiorari was denied, 348 U.S. 839.

Thirteen years later, in 1955, a writ of habeas corpus setting aside the conviction was granted in *United States ex rel. Caminito* v. *Murphy,* 222 F. 2d 698 (2d Cir., 1955) reversing 127 F. Supp. 689 (N.D.N.Y., 1955). Judge Frank writing for the court (Chief Judge Clark concurred separately), concluded that the undisputed facts "make it clear that [Caminito's] trial did not measure up to the standards prescribed by the due process clause of the 14th Amendment, and that his confession "was no more evidence than if it had been forged." 222 F.2d at pp. 700, 702). Chief Judge Clark, concurring in the result, wrote that the extent of permissible questioning was one of "degree" and he could "respect the views of the state judges as rationally developed even though I must disagree." (222 F.2d at p. 706). The indictment was subsequently dismissed, and the District Attorney admitted, in open court, that his office never had any other evidence but the confession. (*Caminito* v. *City of New York,* 45 Misc 2d at p. 246; Caminito Record on Appeal p. 30).*

In 1963, Caminito (with the same attorney as in the instant case) commenced a civil action against the City for malicious prosecution, false arrest and conspiracy, and moved for summary judgment on the basis of the conclusions of law contained in *United States ex rel. Caminito* v. *Murphy, supra.* On the malicious prosecution claim, Special

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* This decision to prosecute (upon the confession alone) was not made by the City police, but by the District Attorney, and is not a part of the claim in either this case or *Caminito.* See discussion of immunity in *Dacey* v. *N.Y. County Lawyers,* 432 F.2d 188 (2d Cir., 1969) cert. den. 398 U.S. 929 (1970).

Term granted partial summary judgment to plaintiff, holding, as a matter of law, that there was no probable cause for the prosecution (and leaving for trial only the issue of malice).* Special Term held that this Court's decision on the *habeas corpus* petition had established conclusively that "police officers, by 'improper', 'fraudulent', 'undue', and 'unlawful' means coerced plaintiff and extorted from him a confession which [was] found, in effect, to be a forgery" and which was the sole and proximate cause of plaintiff's indictment and conviction. Therefore, Special Term concluded, the presumption of probable cause arising from the conviction was "completely nullified."

The Appellate Division reversed (25 AD 2d 848), but what is most significant is that it granted summary judgment *to the defendant*. The Appellate Division held that, as a matter of law, plaintiff had failed to overcome "the presumption of probable cause created by the indictment and conviction." The conviction, the Appellate Court held "establishes prima facie probable causes for the prosecution unless plaintiff can show that the judgment was obtained by fraud, perjury, conspiracy or other undue means", but "has not made the requisite showing" where the conviction was obtained after trial at which all the facts surrounding the obtaining of the confession were revealed. "A

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* The *Caminito* case, which had the same attorney as did the instant case, also involved similar causes of action for false arrest and conspiracy. The cause of action for some 40 hours of false arrest was dismissed, as it was the instant case, and we have discussed that aspect of the case, supra, at p. 10. The conspiracy cause of action was dismissed by Special Term as adding nothing to the primary torts alleged; the tort is based on the acts and not the agreement; and the "existence of conspiracy does not create a civil cause of action" (45 Misc 2d at 253). On plaintiff's appeal, the Appellate Division affirmed this part of Special Terms order "in conformity with the opinion of the Special Term that they add nothing to the complaint (25 AD 2d at 849). The cause of action for conspiracy, though pleaded here (13-15), was apparently, and properly, abandoned or ignored.

determination, 14 years after judgment, that plaintiff's constitutional rights were violated" said the Court, "is insufficient to expose defendant to an action for malicious prosecution for a proceeding which was properly conducted with probable cause under then-existing State Law."

Whether we say that the judgment is "conclusive evidence of probable cause", as was said in *Dacey* v. *N.Y. County Lawyers Assn.*, 423 F. 2d 188, 195 (2d Cir. 1969) as to a *reversed* judgment, or that the "presumption" is not rebutted as a matter of law, as was said in *Caminito, supra,* the *result* is the same. The *Caminito* result, which was affirmed without opinion in 19 NY 2d 931 (1966), constitutes the substantive law of New York and, we submit, defeats the instant claim as a matter of law.

The Trial Court agreed that the substantive law of New York State governs here, and it devoted much of its opinion to discussing the *Caminito* case—concluding that it was distinguishable from the instant case (115-116). Since we regard this as crucial, we set forth here the Trial Court's entire discussion of this point before responding to it (116):

> "It can be argued that the jury properly found, on the record before it, that Mr. Williams suffered not only a violation of his constitutional rights, but also that his conviction was obtained by undue means and without probable cause. *Caminito* dealt with an undisputed record, upon a motion for summary judgment, and did not include allegations of threats against the life of the accused or of physical torture. Although the court found that a conviction obtained on the basis of a confession which was the result of extended interrogation, during which the defendant was kept incommunicado and was confronted with individuals who pretended to identify him as the perpetrator of the crime in question, was not obtained by undue means,

> it can be argued that this jury was justified in finding that a conviction obtained on the basis of a confession which was the product of physical torture and threats against the life of the defendant was obtained by 'undue' or 'corrupt' means. There is a great difference between the facts which were stipulated in *Caminito* and the facts which the jury might reasonably have found on this record."

That, we submit, is no distinction. This action, as *Caminito,* is in malicious *prosecution,* not in assault. The damages awarded ($40,000) were not for some slight and non-permanent physical injury. The prosecution claim in *both* cases is that the municipal defendant, by its police, —we quote from the *Caminito* complaint—did "maliciously and intentionally procure illegal and wrongful confessions with the intent of obtaining the conviction of plaintiff despite his actual innocence" and "did permit certain false and misleading confessions to be presented at the trial, knowing of the falsity thereof and took no action to correct the same" (*Caminito,* Record, p. 15, Complaint, par. 19). The gravamen of the complaints in both cases was the obtaining of confessions reasonably known to be false, and *prosecuting* plaintiff by presenting those confessions (as the only evidence of guilt) as voluntary and credible.

While it is true that in his civil suit Caminito did not allege physical brutality, it is inaccurate to suggest that he did not, in the civil suit, allege that his confession was extracted by "undue" means. How else would he explain his confession if, as he maintained, he was innocent? He did plead, in his complaint, and did set forth in his affidavit, that he was continuously interrogated for over 27 hours without sleep; and Special Term specifically based its decision in Caminito's favor on this Court's determination of

"undue" means (See 45 Misc 2d 241, 251). Moreover, he relied on this Court's decision in the *habeas corpus* proceeding where it was explicitly held that the means used to obtain the confession were *indistinguishable* from physical brutality (222 F. 2d at p. 701): "It has no significance that in this case we must assume there was no physical brutality. For psychological torture may be far more cruel. To keep a man awake beyond the point of exhaustion, while constantly pummelling him with questions, is . . . to deprive him of the will to resist." * As for Caminito's testimony at the criminal trial, that he "gave those answers for fear", this Court said: "Even without [such testimony] we are bound to infer, on the undisputed facts, that something of the sort actually happened" (222 F. 2d at pp. 701-702).

It therefore does not distinguish this case from *Caminito* to say here that a jury could find that this plaintiff's confession was procured by fear induced by threats whereas in *Caminito* (insofar as the Court was bound to accept the undisputed facts), the confession was procured by deceptions and physical fatigue, where the effect, in each case, was a weakening of the will to resist.** The essential similiarity is that in both malicious prosecution cases it is alleged that police, with malice, *prosecuted* solely on the basis of confessions, later held, upon evolved standards, to have been improperly obtained, and which plaintiff alleges, should have known to police to be false. What is common to both cases and controlling, we submit, is that the allegation of "undue" means had been fully tried in the criminal

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* In a footnote to this comment (222 F. 2d at p. 701) the court wrote: "Perhaps it is inaccurate to describe such punishment as not 'physical' since pronounced fatigue may have hidden physiological consequences."

** In fact, the decision in Caminito's case—*United States ex rel. Caminito* v. *Murphy*, 222 F. 2d 698 (2d Cir., 1955) was cited as a precedent and relied on in this plaintiff's case—*United States* v. *ex rel. Williams* v. *Fay*, 323 F. 2d 65 (2d Cir., 1963) at pp. 63-69.

proceedings (on the same evidence) before a jury which necessarily found that these confessions were voluntary and credible, and these criminal proceedings, in each case, resulted in final affirmances, thus establishing that they were "properly conducted under then existing State law" (25 AD 2d 848, 849).

POINT II

If, arguendo, plaintiff is entitled to prevail, his judgment against the City should be limited to the compensatory damages awarded by the jury. There is no basis for punitive damages where, as here, defendant City's liability was imposed under the doctrine of respondeat superior for the acts of others. Furthermore, under New York law, for reasons of the public policy, a municipality is not liable for punitive damages even under circumstances where a private party would be.

The Trial Court submitted a claim for punitive damages to the jury, and while no exception taken to this charge, the defendant did raise the issue in its post-trial motion (102, 104), and the Trial Court, without citing authorities or indicating whether it was applying New York law, responded to this part of the City's motion, as follows: "While punitive damages are only permitted against public bodies in extreme cases, the facts which the jury must have found in order to return a judgment for plaintiff are clearly extreme." (116).

(1)

We submit that the issue as to punitive damages, even if not properly preserved by exception to the charge, is a "substantial departure" from the law and should thus be reviewed by this court for the reasons stated in *Ferrara* v.

Sheraton McAlpin Corp., 311 F. 2d 294 (2d Cir., 1962).* See also *Blier* v. *U.S. Lines Co.*, 286 F. 2d 920 (2d Cir., 1961), and cases cited herein on p. 922; 5A MOORE'S FEDERAL PRACTICE (2d Ed.) §51.04. An error as punitive damages is of "vital" importance. See *Stevenson* v. *Hearst Consol. Publications*, 214 F. 2d 902, 908 (2d Cir., 1954). Moreover, judicial correction is more appropriate here since the error relates not to the *manner* of the instruction and the relief sought (and sought below by post-trial motion) does not require new trial but merely the application of the correct legal principle to the verdict. Cf. *Horton* v. *Moore-McCormack*, 326 F. 2d 104, 108 (2d Cir., 1964).

(2)

Where the substantive claim is one under State law (as is this claim for malicious prosecution), the the availability of punitive damages is likewise a matter of the State law. 1A MOORE'S FEDERAL PRACTICE (2d Ed.) §0.310, footnote 18. See, *Davenport* v. *Mutual Benefit Health & Accid. Ass'n.*, 325 F. 2d 785, 787 (9th Cir., 1963); *Adams* v. *Griffith*, 51 F. Supp. 549, 550 (W.D. Mo., 1943); *DuPont Galleries Inc.* v. *International Magne-Tape Ltd.*, 300 F. Supp. 1179, 1180

* In *Ferrara*, Judge Marshall (with Judge Friendly concurring) wrote (311 F. 2d at pp. 297-298): "We are fully cognizant of the appropriate restraint which must inform and limit an appellate court when it exercises the power of judicial review over a judgment entered after a trial by a jury. The appropriateness of such restraint is reinforced in the present case by the rationale of Rule 51, which is designed primarily to preclude an appellate court from considering alleged errors that the trial court was never given an opportunity to correct. But we must also remain cognizant of the responsibilities of an appellate court to insure that trial court judgments have been rendered in conformity with applicable rules of law. When the integrity of a trial court's judgment has been called into question by a substantial departure from those rules, an appellate court cannot put aside this responsibility merely because of the inadvertance of appellant's counsel at trial."

(S.D.N.Y., 1969); *Fox* v. *City of West Palm Beach*, 383 F. 2d 189, 195 (5th Cir., 1967), cf. *Stevenson* v. *Hearst Consol. Publications*, 214 F. 2d 902, 911 (2d Cir., 1954); *Reynolds* v. *Pegler*, 223 F. 2d 429, 434 (2d Cir., 1955).

Under New York law, we urge two separate reasons why punitive damages are inappropriate here, either alone sufficient. One is that punitive damages, where the purpose is to deter, do not lie against a vicariously responsible party. The other is that, as a matter of public policy, punitive damages do not lie against the State or its subdivisions, i.e., against the public, even where justified against a private party.

(3)

The rationale of punitive damages is deterrence where compensatory damages alone would not be sufficient. *Walker* v. *Sheldon*, 10 NY 2d 401, 404 (1961). See also, *Stevenson* v. *Hearst Consol. Publications*, 214 F. 2d 902, 908 (2d Cir., 1954). Deterrence arises from the hardship of the judgment upon the wrongdoer personally. It does not accomplish that purpose where those who did the wrong have long since terminated their city service. (Also, police methods in line with intervening Supreme Court decisions, are far different than what were back in 1948). All this strong justification for the well-established principle that punitive damages are not awarded against an employer unless *particips criminis* to the employees' wrongful acts. *Craven* v. *Bloomingdale*, 171 N.Y. 439, 447 (1902); *Cope* v. *John Wanamaker*, 249 App. Div. 747 (2d Dept., 1936) affd. 274 N.Y. 622 (1937); *Snyder* v. *State*, 20 AD 2d 827 (3d Dept., 1964). See also *Lake Shore & Mich. So. R.* v. *Prentice*, 147 U.S. 101, 107 (1893). There is no such showing here—and there could not be any such showing against a corporate entity, we submit, unless perhaps it were

established that the wrongful acts were done pursuant to orders from the highest levels of the administration, or *knowingly* ratified at such levels. The Trial Court here held the award of punitive damages to be proper because the jury must have found the conduct of the "the police" "clearly extreme" (116). If so, the greater is the warrant for punitive damages, but *only* against the officers personally. See, *Murray* v. *Long Is. R.R. Co.*, 35 AD 2d 579 (2d Dept., 1970) affd. 28 NY 2d 849 (1971).

Very appropriate here is *Baynes* v. *City of New York*, 23 AD 2d 756 (2d Dept., 1965), where liability was imposed against the City based on a claim of physical brutality in the police station, i.e., that a police officer struck plaintiff over the head with a night stick, resulting in a fractured skull and loss of sight in one eye. The Court affirmed the jury's finding for plaintiff, but set aside a verdict for punitive damages *against the City* saying "we find no proof in the record to justify any assessment for punitive damages against defendant City of New York," citing the *Craven, Cope* and *Snyder* cases.

(4)

The denial of punitive damages against the State, County, or a municipality can also be grounded, in New York, on public policy. See *Costich* v. *City of Rochester*, 68 App. Div. 623, 630 (4th Dept., 1902), where Justice Hiscock (later Chief Judge of the Court of Appeals) wrote (at p. 631-632):

> "There are weighty reasons, whether we seek to designate them by that very general term 'public policy' or otherwise, which oppose the application of the doctrine of punitive damages to municipal corporations even in cases where they might be justifiable against private corporations . . . There is not any corresponding hard-

> ship to the injured party in denying this liability. He is entitled in a proper case to have full compensation for all injuries actually sustained."

See also, *Nephew* v. *State,* 178 Misc. 824, 826 (Ct. Cl., 1942); *McCandless* v. *State,* 6 Misc 2d 391, 395 (Ct. Cl., 1956) modified on other grounds 3 AD 2d 600 (3rd Dept., 1957) affd. 4 NY 2d 797 (1958). In *Weglarz* v. *City of New York,* 12 AD 2d 977 (2d Dept., 1960), like here a false arrest-malicious prosecution action, the total award against the City alone was $225,000. In reducing that award drastically, the appellate court held that an award in excess of plaintiff's actual losses could not be justified (in an action solely against the municipality) as "punitive damages were not involved and may not be recovered."

In *Eifert* v. *Bush,* 51 Misc 2d 500 (Sup. Ct., Nass. Co., 1966), Special Term allowed an examination before trial as to the training of police officers as relevant to the issue of possible punitive damages against the defendant County. Training methods might be described as a high-level decision and this would distinguish cases such as *Baynes, supra* (and the instant case). The Appellate Division, in reversing (27 AD 2d 950 [1967] affd. 22 NY 2d 681 [1968], said "we see no reasonable possibility that an appellate court could sustain an award of punitive damages against the county," and cited *Costich, supra,* a "public policy" case.

In addition to *Costich,* the Appellate Division cited *Fisher* v. *City of Miami,* 172 So. 2d 455, 457 (Fla., 1965—n.o.r.), where it was written:

> "The public policy which motivates the conclusion [denying punitive awards against municipalities] appears to be sound. Since punishment is the objective, the peo-

ple who would bear the burden of the award—the citizens—are the self-same group who are expected to benefit from the public example which the punishment makes of the wrongdoer." *

CONCLUSION

The judgment should be reversed and the complaint dismissed. In the alternative, if plaintiff is entitled to recover, the judgment should be limited to the jury's award for compensatory damages.

May 8, 1974

Respectfully submitted,

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* The same rationale prevails in this Court in federal cases. In a case involving a violation of the Securities Exchange Act, this Court declined to allow punitive damages against "a publicly held corporation," and wrote that "the purpose of such damages would *not* be served" because the "heavy burden would ultimately fall on all the stockholders, including mere innocent pawns." *Green* v. *Wolf Corp.*, 406 F.2d 291, 303 (2d Cir., 1968), cert. den. 395 U.S. 977 (1969). See also, PROSSER, *Torts* (3d Ed.) § 2, at p. 12.

AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

State of New York, County of New York, ss.:

JAMES J. BOLAND

being duly sworn, says, that on the 8 day of May, 19 74

at No. 100 Church St in the Borough of Manhattan in The City of New York, he served three copies

of the annexed Brief upon Harry Lipsig Esq.,

the attorney for the Petitioner-Appellee in the within entitled action by delivering

three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and

leaving the same with him.

Sworn to before me, this 8

day of May, 19 74

James J. Boland

John Calia

JOHN CALIA
Notary Public, State of New York
No. 41-5573935 Queens County
Certificate Filed in New York County
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